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SUPREME COURT, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 349

WEYERHAEUSER COMPANY
Petitioner

vs.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR WEYERHAEUSER COMPANY

THOMAS R. McMILLEN
135 South La Salle Street
Chicago, Illinois

JAMES B. MORAN
135 South La Salle Street
Chicago, Illinois

La Salle Street Press—Chicago 10

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In its brief opposing our Petition for a Writ of Certiorari, the National Labor Relations Board has raised the contention that the Petition was untimely. It relies upon three cases,[1] in all of which a petition or appeal was held timely when based upon a formal order which was entered later than the date of the court's opinion. These cases themselves establish the lack of merit in the Board's contention, and we shall allude to this fact hereinafter.

[1] *United States* v. *Schaefer Brewing Co.*, 356 U.S. 227; *United States* v. *Hark*, 320 U.S. 531; *Commissioner* v. *Estate of Bedford*, 325 U.S. 283.

The rules of the Court of Appeals for the Seventh Circuit specifically deal with judgments in proceedings involving the enforcement of administrative orders. Rule 23 of that court reads in part as follows:

> . . . In all cases *except that of a decree enforcing the order of an administrative tribunal*, judgment shall be entered on the date the opinion is filed. (See Rule 14(1) for decrees in reviews of administrative tribunals.) [Emphasis supplied.]

Rule 14(1) reads as follows:

> (1) Preparation of Decrees Enforcing Orders; Settlement; Entry. When an opinion of this court is filed, directing the entry of a decree enforcing in whole or in part the order of an administrative agency, board, commission, or officer and the court has not entered the decree, the agency, board, commission or officer concerned shall within 10 days serve upon the opposing party and file with the clerk a proposed decree in conformity with the opinion. If the opposing party objects to the proposed decree as not in conformity with the opinion he shall within 5 days thereafter serve upon the agency, board, commission, or officer concerned and file with the clerk a proposed decree which he deems to be in conformity with the opinion. The court will thereupon settle and enter the decree without further hearing or argument.

The Board itself, by its conduct, clearly evidenced that it was aware of Rule 14(1) and was proceeding in accordance with it. It filed a "proposed decree" with the clerk on April 18, 1960, and certified to the court its service upon Petitioner. (Appendix 1a and 2a.) By the court's rule, Weyerhaeuser Company had five days to object to the entry of the decree. Petitioner asked the court for a rehearing on April 21, 1960, and the Board's proposed decree was therefore not entered until May 23, 1960. The Board now apparently contends that the proposed decree, submitted

by it to the court below and subject to objection by the Petitioner, was a gratuitous afterthought and not the customary and expectable final act of the court. This inconsistent position is similar to the one which this Court considered as a factor in holding, in *U.S.* v. *Schaefer Brewing Co.*, 356 U.S. 227 (*supra* f.n. 1), that an appeal to the Court of Appeals for the Second Circuit was timely under the provisions of the Federal Rules of Civil Procedure.

The Board further asserts that the entry of this formal decree was purely a ministeral act. This argument ignores the opportunity given to the Petitioner by rule to object to the entry of decree. It further ignores the cases upon which the Board itself relies. The final order in *Commissioner* v. *Estate of Redford*, 325 U.S. 283 (*supra*, f.n. 1) was an order signed by the clerk, not the judges, merely formalizing the prior decision of the court, and this Court specifically noted that the clerk was performing a ministerial act according to the court's standing instructions. It was nevertheless held to be the final act from which the appeal time began to run.

As the three cases also show, the date of the judgment or decree is dependent in large measure upon whether the order clearly evidenced the intention of the court that it should be its final act. Formal judgment, as was entered in the case at bar on May 23, 1960, is *prima facie* the decision or judgment of the court. As stated in *United States* v. *Hark*, 320 U.S. 531 (*supra*, f.n. 1), at page 535:

> The judge was conscious, as we are, that he was without power to extend the time for appeal. He entered a formal order of record. We are unwilling to assume that he deemed this an empty form or that he acted from a purpose indirectly to extend the appeal time, which he could not do overtly. In the absence of anything of record to lead to a contrary conclusion, we take the formal order of March 31 as

in fact and in law the pronouncement of the court's judgment and as fixing the date from which the time for appeal ran.

The understanding of the court below is clearly evidenced by the court rules and by its entering of the signed decree of May 23, 1960. The understanding of the Clerk of the Court of Appeals for the Seventh Circuit is evidenced by the fact that the document set forth by the Board in its appendix was not included as part of the certified record of the proceedings in the court below.[2] The understanding of Petitioner is evidenced by the fact that it petitioned from the decree of May 23, 1960.

Petitioner need not, however, depend upon this *prima facie* showing, nor need it depend upon local practice, as was the case in *Commissioner* v. *Estate of Bedford*, 325 U.S. 283 (1945). The Court of Appeals' rule is perfectly clear on the question, and the unsigned order of April 6, 1960, upon which the Board now relies, was of no significance whatsoever in fixing the date for an appeal.

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[2] The Clerk of the Court of Appeals stated, in response to our inquiry, that it is his practice not to include such a document in the certified record of an enforcement case, since he does not consider it the final order of the court. Petitioner further understands that this document was certified to the court only on specific request of the Board, having been omitted from the original certified record for the foregoing reason. Petitioner never received a copy of it and was not aware of its existence until receiving the Board's brief in opposition to a writ of certiorari.

CONCLUSION

The form of the decree of May 23, 1960, the court's rules, and the understanding of the parties as evidenced by their conduct clearly establish that the decree of May 23, 1960, was, and was intended to be, the final act of the court. The raising of an issue so clearly without merit suggests that the Board does not wish to meet the merits of our Petition for a Writ of Certiorari. Further, its reliance upon its view of the testimony in the record, in preference to meeting the issue raised by the Petitioner respecting the sufficiency of the administrative decision, further supports Petitioner's position that this Court should review the sufficiency of the administrative proceedings in the case at bar.

Respectfully submitted,

THOMAS R. MCMILLEN
135 South La Salle Street
Chicago 3, Illinois

JAMES B. MORAN
135 South La Salle Street
Chicago 3, Illinois

APPENDIX

NATIONAL LABOR RELATIONS BOARD
Office of the General Counsel
Washington 25, D. C.

April 14, 1960

Kenneth J. Carrick, *Esquire*
Clerk, United States Court of
Appeals for the Seventh Circuit
1212 Lake Shore Drive
Chicago, Illinois

Re: No. 12793—N.L.R.B. v. Weyerhaeuser Company, a corporation as successor to Ace Folding Box Corp.

Dear Mr. Carrick:

We are enclosing eight mimeographed copies of the Board's proposed decree in the above-entitled matter. After entry of the decree by the Court, we would appreciate your returning one certified copy thereof to this office.

Certificate of service is also enclosed.

Very truly yours,
Stuart Rothman
General Counsel

By s Marcel Mallet-Prevost
Marcel Mallet-Prevost
Assistant General Counsel

cc & dcc. to:

Messrs. Bell, Boyd, Marshall & Lloyd
Att.: Thomas R. McMillan, Esquire
135 South La Salle Street
Chicago 3, Illinois

Benjamin M. Robinson, Esquire
230 Park Avenue
New York 17, New York

Stamped "Received in Clerk's Office Apr 18 1960" U.S.C.A.—7th Circuit

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

WEYERHAEUSER COMPANY, a corporation,
as successor to ACE FOLDING BOX CORPORATION,
Respondent.

CERTIFICATE OF SERVICE

The undersigned certifies that one copy of proposed decree in the above case was this day served by first class mail upon the following counsel at the addresses listed below:

Messrs. Bell, Boyd, Marshall & Lloyd
Att.: Thomas R. McMillan, Esquire
135 South La Salle Street
Chicago 3, Illinois

Benjamin M. Robinson, Esquire
230 Park Avenue
New York 17, New York

By /s/ Marcel Mallet-Prevost
Marcel Mallet-Prevost
Assistant General Counsel

NATIONAL LABOR
RELATIONS BOARD

Dated at Washington, D. C.
this 14th day of April, 1960

[Stamped "Received in Clerk's Office Apr 18 1960", U.S.C.A.—7th Circuit]